
IN THE CALIFORNIA SUPREME COURT

No. S244412, S244433

JASON CROSS, et al.,
Plaintiffs-Respondents, Cross-Appellants, and Petitioners,
vs.

FACEBOOK, INC.,
Defendant-Appellant, Cross-Respondent and Respondent.

After a Decision by the California Court of Appeal,
First Appellate District, Division Two
Case Nos. A148623, A149140

California Superior Court, San Mateo County
Civil Case No. CIV537384
Honorable Donald J. Ayoob

FACEBOOK, INC.'S ANSWER TO PETITION FOR REVIEW

Eric D. Miller, Bar No. 218416
EMiller@perkinscoie.com
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101
Telephone: 206-359-8000
Facsimile: 206-359-9000

Julie E. Schwartz, Bar No. 260624
JSchwartz@perkinscoie.com
Lauren B. Cohen, Bar No. 285018
LCohen@perkinscoie.com
Perkins Coie LLP
3150 Porter Drive
Palo Alto, CA 94304-1212
Telephone: 650.838.4300
Facsimile: 650.838.4350

Michael B. Garfinkel, Bar No. 156010
MGarfinkel@perkinscoie.com
Perkins Coie LLP
1888 Century Park East, Suite 1700
Los Angeles, CA 90067-1721
Telephone: 310-788-9900
Facsimile: 310-788-3399

Attorneys for Respondent FACEBOOK, INC.

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in California Rules of Court 8.208:

Full Name of Interested Person	Nature of Interest
Mark Zuckerberg	Ownership interest of 10% or more in Facebook, Inc.

DATED: October 10, 2017

PERKINS COIE LLP

By: /s/ Eric D. Miller

Eric D. Miller

*Attorneys for Respondent
Facebook, Inc.*

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INTRODUCTION

Petitioners' lawsuit is an attempt to force Facebook—a social media platform with over two billion users—to remove critical content posted by third parties about fatal traffic accidents involving individuals driving vans emblazoned with the name and logo of country rap artist Petitioner Jason Cross a/k/a Mikel Knight. The Court of Appeal recognized the lack of merit in Petitioners' claims and issued a thorough and well-reasoned opinion based on three long-established and uncontroversial principles:

1. California's anti-SLAPP statute applies to lawsuits that challenge an internet service provider's constitutionally protected right to make editorial decisions concerning third-party content on a public issue;
2. Claims that attempt to hold an internet service provider liable as the "publisher or speaker" of third-party content are barred by the federal Communications Decency Act ("CDA"), 47 U.S.C. § 230; and
3. Right of publicity claims, both common law and statutory, require a "use"—by the defendant—of an individual's name or likeness.

Petitioners do not challenge any of these legal principles, or any of the Court of Appeal's findings in this action. Instead, while conceding that Facebook did not create the critical pages or posts and that Facebook did not use Knight's name or likeness in any advertisement, Petitioners repeat their same failed arguments that Facebook's Terms and Community Standards obligated Facebook to remove content they do not like, and that Facebook violated Knight's right of publicity when third parties mentioned his name or used his likeness in their critical commentary and posts on Facebook.

Petitioners' disagreement with the Court of Appeal's resolution of their claims is not a sufficient basis for this Court's review, and in any event, the Court of Appeal correctly concluded that the gravamen of the Complaint is Knight's objection to the third-party content and Facebook's editorial decisions not to remove that content. Petitioners thus cannot demonstrate that this Court's review is necessary to secure uniformity of decision or settle an important question of law under Rule of Court 8.500(b)(1).

In an effort to secure this Court's review of their failed claims, Petitioners misconstrue both the speech and advertising practices at issue. But the Court of Appeal properly rejected those efforts. With regard to the former, the Court dismissed Petitioners' arguments as contrary to the allegations in the Complaint. As to the latter, while the Petition argues that this case raises important issues involving Facebook's advertising services, no such issues were raised below. To the contrary, the Court of Appeal was asked to answer a simple question: whether Facebook "used" Knight's name or likeness in violation of his right of publicity by serving unrelated third-party advertisements adjacent to the allegedly objectionable content, created by different third parties, using Knight's name or likeness. Applying well-settled case law, the Court of Appeals rejected Petitioners' invitation to adopt this nonsensical and boundless definition of "use" in the right of publicity context, and recognized that doing so would render ad-

supported, free Internet services like Facebook unviable. This Court need not revisit this routine and unsurprising decision of the Court of Appeal.

Because Petitioners have failed to carry their burden to establish that review by this Court is necessary or warranted, the Petition for Review should be denied.

STATEMENT OF THE CASE

A. Factual Background

Facebook operates a free social networking service that enables two billion users worldwide and millions of Californians to stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them. Use of this free service is subject to Facebook's Terms of Service, referred to as Facebook's Statement of Rights and Responsibilities ("Terms"). (1 AA 55 ¶ 3.) Facebook users agree to the Terms when they sign up for a Facebook account and each time they access or use Facebook. (*Ibid.*)

The Terms provide that Facebook has the discretion, but not the obligation, to remove content that violates Facebook policies. (1 AA 59 § 5.2 ["We can remove any content or information you post on Facebook if we believe that it violates this Statement or our policies."].) They also make clear that Facebook is not responsible for "the content or information users transmit or share on Facebook," for "any offensive, inappropriate, obscene, unlawful or otherwise objectionable content or information you may encounter on Facebook," or for "the conduct, whether online or offline, of

any user of Facebook.” (1 AA 60 § 15.2; see also 1 AA 59 § 3 [“We do our best to keep Facebook safe, but we cannot guarantee it.”].)

Facebook’s Community Standards provide further guidance to users about what kind of content they can share on Facebook and the types of discretionary actions Facebook may take with regard to content posted by others. (1 AA 63-66.) Like the Terms, the Community Standards provide that while Facebook may remove user content, it will not always remove content that a particular user might find objectionable. (1 AA 63 [“[P]lease keep in mind that something that may be disagreeable and disturbing to you may not violate our Community Standards.”], [“We remove credible threats of physical harm to individuals.... We may consider things like a person’s physical location or public visibility in determining whether a threat is credible”]; 1 AA 65 [“Reporting something doesn’t guarantee that it will be removed because it may not violate [Facebook’s] policies.”], [“Our review decisions may occasionally change after receiving additional context about specific posts or after seeing new, violating content appearing on a Page or Facebook Profile.”].)

B. Procedural Background

1. Petitioners sued Facebook for not removing third-party content critical of Knight

Petitioner Knight is a public figure who describes himself as a professional “Country Rap” recording artist. (1 AA 9 ¶ 6.) Petitioner 1203 Entertainment, LLC is Knight’s record label. (1 AA 10 ¶7.) Petitioner

MDRST Marketing/Promotions, LLC, 1203 Entertainment’s subsidiary, hired independent contractors to travel across the country in vans featuring Knight’s name and logo, promoting and selling Knight’s music and merchandise to the public. (*Ibid.*)

In June 2014, two of these vans were involved in separate accidents when their drivers fell asleep at the wheel. (1 AA 10 ¶¶ 8-9.) The accidents killed two people and seriously injured another. (*Ibid.*) Shortly after the accidents, a publicly available Facebook page called “Families Against Mikel Knight” was created, allegedly by persons related to the injured and deceased independent contractors. (1 AA 10-11 ¶¶ 11-12.) Petitioners claim that the Facebook page criticizing Knight and his business practices (and later, other similar pages¹) was created without his consent, and that the pages use his name and likeness without authorization. (1 AA 10 ¶ 11; 1 AA 15 ¶ 31.) Petitioners also offer conclusory assertions that Facebook placed “ads on all the unauthorized Facebook pages.” (1 AA 12-13, 16 ¶¶ 17-20, 34.) In response to Facebook’s anti-SLAPP motion, however, Petitioners submitted evidence showing that, in fact, either *no ads* appeared or unrelated ads (such as credit card and loan refinancing ads) appeared

¹ By December 2015, the Families Against Mikel Knight page was no longer accessible, but other allegedly unauthorized pages—“Jason cross aka mikel knight” and “Prove yourself Jason Cross aka Mikel Knight”—were created and remained available at the time this lawsuit was filed. (1 AA 15 ¶ 31.)

alongside the pages critical of Knight and his company's business practices.
(1 AA 155-59.)

2. Superior Court Proceedings

On February 16, 2016, Petitioners filed a verified Complaint against Facebook,² alleging six causes of action: (1) breach of written contract; (2) negligent misrepresentation; (3) negligent interference with prospective economic relations; (4) breach of Civil Code section 3344; (5) violation of common law right of publicity; and (6) unlawful and unfair business practices, Business and Professions Code section 17200 (the UCL claim).³

In response, Facebook filed a demurrer and a special motion to strike the Complaint under the anti-SLAPP statute, California Code of Civil Procedure § 425.16. The anti-SLAPP motion demonstrated that Petitioners' Complaint arose from Facebook's exercise of its constitutional right of free speech in connection with an issue of public interest, and that Petitioners could not show a probability of success for two reasons: (1) the claims were barred by the CDA; and (2) even if not, the claims were not viable under California law.

² This was at least the second attempt by Petitioners to sue Facebook. In August 2015, a Tennessee court dismissed virtually identical claims on the grounds that Facebook, an internet service provider, did not create the content at issue and was therefore immune from Knight's claims under the CDA.

³ Petitioner Knight asserted all six causes of action; Petitioner 1203 Entertainment joined the third cause of action; and all Petitioners joined as to the sixth cause of action.

After a hearing, the superior court issued a six-page order holding that Facebook had shown that the first step of the anti-SLAPP analysis was satisfied because, “i[t] cannot be disputed that Facebook’s website and the Facebook pages at issue are ‘public forums,’” and “the content of the subject Facebook pages concern public issues or issues of public interest.” (1 AA 325.) The court observed that the lawsuit “clearly targets Facebook’s ability to maintain a forum for discussion of these issues, including its discretion to remove content that Plaintiffs find objectionable.” (*Ibid.*)

As to the second step—whether Petitioners had shown a probability of success on the merits of their claims—the superior court held that the first three claims were barred by the CDA, which provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” (*Ibid.* [citing 47 U.S.C. § 230(c)(1)].) The court noted that it was undisputed that Facebook is an “interactive computer service,” and that the pages to which Plaintiffs objected contained content provided by another “information content provider.” (1 AA 327.) As such, the superior court concluded, the first three causes of action—for breach of contract, negligent misrepresentation, and negligent interference with prospective economic relations—were barred because these causes of action “treat[ed] Facebook as the ‘publisher’ . . . of the . . . content” to which Plaintiffs object. (*Ibid.*) The court thus granted the anti-SLAPP motion as to those three claims.

The superior court went on, however, to hold that Petitioners' three remaining claims—common law and statutory right of publicity, and the derivative UCL claims—were not barred by the CDA. (1 AA 328.) Pointing to Section 230(e)(2)'s language that “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property,” and based on its determination that “the right of publicity protects a form of intellectual property,” the court held the CDA inapplicable to such claims. (*Ibid.* [quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 399].)

The superior court further held that Knight had shown a probability of prevailing on his right of publicity claims because he alleged that Facebook ran unrelated advertisements adjacent to the “unauthorized” pages created by the third parties critiquing Knight and his business practices. (*Ibid.*) According to the court, by allowing unrelated advertisements (also created by third parties) to run adjacent to the third-party-generated content critical of Knight, Facebook “used” Knight’s name and likeness in violation of his right of publicity. The superior court reached this conclusion even though the ads that appeared adjacent to these pages were also created by third parties, did not advertise Facebook’s products or services, and were unrelated to, and did not use, Knight’s name or likeness. On that basis, the superior court denied Facebook’s anti-SLAPP motion and overruled Facebook’s demurrer as to Knight’s right of publicity and derivative UCL claims. (1 AA 328-29.)

3. Court of Appeal Proceedings

Both Facebook and Petitioners appealed, and the Court of Appeal ordered the appeals consolidated. The Court of Appeal then (1) affirmed the superior court's order granting the motion to strike the first three causes of action for breach of contract, negligent misrepresentation, and negligent interference with prospective economic relations and (2) reversed the superior court's order denying the motion to strike the right of publicity and derivative UCL claims, and instructed the superior court to enter an order granting the anti-SLAPP motion in its entirety and striking the Complaint. (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190.)

The Court of Appeal agreed that "Facebook's website and the Facebook pages at issue are 'public forums'" for purposes of the anti-SLAPP statute. (*Id.* at p. 199.) Further, the Court of Appeal found that Petitioner's lawsuit involved "an issue of tremendous [public] concern": "the issue involved the danger of trucks on highways driven by sleep-deprived drivers." (*Id.* at p. 200.)

The Court of Appeal explicitly rejected Petitioners' argument that the speech forming the basis of their claims was not the public statements on the pages at issue, but rather, was Facebook's alleged statements made in its Terms and Community Standards. (*Ibid.*) The Court reasoned that this argument was "inconsistent with the actual allegations in their complaint, the clear gravamen of which is Knight's objection to the third-party content

on the pages and Facebook’s editorial decisions to not remove them.”

(Ibid.)

Second, the Court of Appeal held that Petitioners had failed to demonstrate a likelihood of prevailing on the merits on each of their six causes of action. With respect to the first three causes of action for breach of contract, negligent misrepresentation, and negligent interference with prospective economic advantage, the Court of Appeal affirmed the superior court’s holding that the CDA barred all three claims. (*Id.* at pp. 206-07.) Once again, the Court specifically rejected Petitioners’ claim that Facebook was liable based on its own promises and representations to Knight, rather than its editorial decisions to allow third party speech. (*Ibid.*)

Despite Petitioners’ claims, the Court of Appeal noted that “‘what matters is not the name of the cause of action’; instead, ‘what matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.’” (*Id.* at p. 207 [quoting *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1101–1102].) As such, it found that “numerous courts have held the CDA bars claims based on a failure to remove content posted by others.” (*Ibid.* [collecting cases].) The Court of Appeal also expressly addressed and rejected Petitioners’ “private” promise theory by explaining that “[c]ontrary to Knight’s assertions, the complaint does not arise from ‘private’ statements or promises made to Knight in Facebook’s terms” and that even if it did, multiple prior courts had rejected similar arguments

because “while Facebook’s Terms of Service ‘place restrictions on users’ behavior,’ they ‘do not create affirmative obligations’ on Facebook.” (*Id.* at 201 [collecting cases].)

With respect to the right of publicity claims and the derivative UCL claim (the last three causes of action), the Court of Appeal reversed the superior court’s determination that Petitioners had shown a probability of prevailing on these claims based on the allegations that “Facebook ran advertisements adjacent to the ‘unauthorized’ pages created by third parties critiquing Knight and his business practices.” (*Id.* at p. 208.) Specifically, the Court of Appeal explained that on the record before it, that there was no “use” of Knight’s name and likeness *by Facebook* as required by both the statutory and common law right of publicity claims. (*Id.* at p. 209.) The Court observed that:

Nowhere does Knight demonstrate that the advertisements appearing next to the pages used his name or likeness, or that any of the advertisements were created by, or advertised, Facebook. All he claims is that Facebook displayed advertisements next to pages created by third parties who were using Knight’s name and likeness to critique his business practices—and their allegedly fatal consequences. While Knight claims that “Facebook continues to place ads on all the unauthorized Facebook pages,” he necessarily concedes that his name and likeness appear not in the ads themselves, but in the content posted to Facebook by third parties. This is insufficient.

(*Ibid.*; see also *id.* at p. 209 n.5 [noting further “Knight’s submission of excerpts of the unauthorized pages... show only unrelated, sponsored content adjacent to the pages”].)

Though Knight’s right of publicity claims failed on that ground alone, the Court of Appeal further held that Knight had also failed to demonstrate “commercial use” by Facebook because he “ha[d] not even alleged—let alone shown—that any advertiser used his name or likeness,” and thus could not “establish that anyone, let alone Facebook, obtained an advantage through use of his identity.” (*Id.* at p. 211.) Because the evidence demonstrated either that no advertisements appeared alongside the pages at issue, or that any advertisements that did appear made no use of Knight’s name or likeness, he could not establish “commercial use”: “At most, Knight has shown that Facebook allowed unrelated third-party advertisements to run adjacent to pages containing users’ comments about Knight and his business practices. This is insufficient.” (*Ibid.*) Having found that Knight failed to allege “use,” let alone “commercial use,” the Court of Appeal declined to reach the issue of whether the CDA barred the right of publicity and derivative UCL claims. (*Id.* at pp. 211-13.)

The Court of Appeal ordered the superior court to enter an order granting the anti-SLAPP motion in its entirety and striking the Complaint, and to hold a hearing to award Facebook its attorney fees under the anti-SLAPP statute. (*Id.* at p. 213.) Petitioners did not seek rehearing in the Court of Appeal, but filed a Petition for Review on September 18, 2017.

ARGUMENT

The Court of Appeal analyzed the anti-SLAPP statute, CDA, and right of publicity claims in a manner consistent with prior decisions,

including decisions of this Court. Those decisions establish that (1) an internet service provider's exercise of editorial discretion over content on a matter of public concern qualifies as conduct in furtherance of free speech and is therefore covered by California's anti-SLAPP statute; (2) the CDA immunizes internet service providers against any cause of action that "inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another," (*Facebook, supra*, 14 Cal.App.5th at p. 207 [citing *Barnes, supra*, 570 F.3d at pp. 1101-02]); and (3) serving unrelated advertisements adjacent to third-party-generated content does not qualify as "use" for right of publicity purposes. Thus, review by this Court is not "necessary" to "secure uniformity of decisions" or to "settle" any issue of law. (Cal. Rules of Court, rule 8.500(b)(1).)

Instead, Petitioners seek this Court's review on the ground that the Court of Appeal's order was erroneous. To that end, they repeat their argument that the courts below misconstrued their claims. But even if that were true, which it is not, Petitioners did not file a petition for rehearing or call these alleged errors to the Court of Appeal's attention. As a result, this Court must accept the facts as set forth by the Court of Appeal. (Cal. Rules of Court, rule 8.500(c)(2); see also *Torres v. Parkhouse Tire Serv., Inc.* (2001) 26 Cal.4th 995, 1000 n.2 [“As a matter of policy’ this court will not consider ‘any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for

rehearing.”]; *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 421 n.4 [declining to address issue that was not raised in petition for review, nor given any “meaningful discussion” in the opening and reply briefs].). Those facts compel denial of the Petition here.

A. The Court of Appeal Correctly Held that the Anti-SLAPP Statute Applies to Each of Knight’s Six Causes of Action

The Court of Appeal correctly applied the first prong of the anti-SLAPP statute to all six of Petitioners’ causes of action because they were premised on Facebook’s conduct in furtherance of its right of free speech in connection with a public issue—specifically, its exercise of editorial discretion regarding certain content posted by third parties on its platform. Indeed, Petitioners do not argue that review is necessary to settle the question of whether Facebook is a public forum or whether the anti-SLAPP statute protects the editorial discretion of service providers. Instead, they challenge the Court of Appeal’s application of settled law to the facts of this case.

The Court of Appeal held, consistent with established law, that Facebook’s decision not to remove the content at issue was an act “in furtherance of the... right of petition or free speech.” (*Facebook, supra*, 14 Cal.App.5th at p. 202 [citing Civ. Proc. Code § 425.16, subd. (b)(1)].) This holding is in line with well-settled law in both the California Courts of Appeal and federal courts: “[W]here... an action directly targets the way a

content provider chooses to deliver, present, or publish news content on matters of public interest, that action is based on conduct in furtherance of free speech rights and must withstand scrutiny under California’s anti-SLAPP statute.” (*Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.* (9th Cir. 2014) 742 F.3d 414, 424–425; see also *Hupp v. Freedom Communications, Inc.* (2013) 221 Cal.App.4th 398, 403 [plaintiff’s claim that defendant publisher breached its user agreement with plaintiff by failing to remove comments made on publisher’s website concerning plaintiff dismissed on anti-SLAPP motion]; *Kronemyer v. Internet Movie Data Base, Inc.* (2007) 150 Cal.App.4th 941, 947 [“[T]he gravamen of the lawsuit is the content of respondent’s Web site: the producer credits for the films at issue.... [T]he listing of credits on respondent’s Web site is an act in furtherance of the right of free speech protected under the anti-SLAPP statute.”].)

Petitioners do not cite a single contrary case. Instead, they repeat their twice-rejected argument that the anti-SLAPP statute does not apply here because the speech at issue is “Facebook’s own representations and statements” made “privately” to Knight in its Terms and Community Standards—rather than its exercise of editorial discretion over the allegedly objectionable third-party content. (Pet. at 3, 7.) But the Court of Appeal explicitly rejected this mischaracterization of the case: “Contrary to Knight’s assertions, the complaint does not arise from ‘private’ statements or promises made to Knight in Facebook’s terms.” (*Facebook, supra*, 14

Cal.App.5th at p. 201.) Indeed, the Court of Appeal held that Petitioners' argument was "inconsistent with the actual allegations in their complaint" and that "the clear gravamen of [the complaint]... is Knight's objection to the third-party content on the pages and Facebook's editorial decisions to not remove them." (*Id.* at p. 200.)

Moreover, the Court of Appeal affirmed the superior court's holding that Petitioners could not avoid application of the anti-SLAPP statute under Section 425.17's "commercial speech" exemption because they had not alleged (nor could they) that Facebook is "primarily engaged in the business of selling or leasing goods or services." (*Id.* at p. 203.) And because the statements at issue were not commercial statements by Facebook about its business operations, but rather, "the speech of the third parties who created the pages and posted negative comments about Knight," Section 425.17 of the anti-SLAPP statute did not apply. (*Ibid.*) Finally, the Court of Appeal determined that, contrary to Petitioners' argument, the language of the Terms and Community Standards preserved Facebook's discretion to remove content that violates its policies—without *requiring* Facebook to take any particular action. (*Id.* at pp. 203-04.) Petitioners did not challenge any of these conclusions through a petition for rehearing at the Court of Appeal, and they may not seek review by this Court to correct what they now contend was error.

Further, to the extent Petitioners ask this Court to review "other important matters that the California Supreme Court could address,"

including whether speech that “seemingly incite[s] violence” should be constitutionally protected and what constitutes a “public issue” in the context of this “violent speech” (Pet. at 11), they misapprehend the standard for review. It is not the policy of the Supreme Court, in lieu of a petition for rehearing by the Court of Appeal, “to review issues that are dependent upon development of a factual record when those issues have not been timely raised in the Court of Appeal or not reached in that court.” (*People v. Peevy* (1998) 17 Cal.4th 1184, 1205.) Thus, as a matter of policy, this Court should decline Petitioners’ request for review of various issues that are irrelevant to the gravamen of Petitioners’ complaint, were not before the Court of Appeal, were not raised in a request for rehearing, and are not the subject of a sufficiently developed factual record. (*Cf.* Pet. at 11.)

In short, Petitioners fail to identify any issue requiring this Court’s review with regard to the Court of Appeal’s application of the anti-SLAPP statute here. Petitioners’ Complaint, despite clear case law to the contrary, sought to hold Facebook liable for its decisions to allow third parties to post speech critical of Petitioners and their business methods to the Facebook platform. Petitioners’ efforts to obfuscate the issues aside, each of their claims directly implicates Facebook’s protected free speech rights—namely, its exercise of editorial discretion as to what content it allows on its platform.

This case is not and was never about whether speech that may incite violence is protected or constitutes a matter of public interest. Nor is it about whether the anti-SLAPP statute allows Facebook to assert the free speech rights of third parties. Rather, where, as here, Facebook’s protected editorial discretion is implicated, it is uncontroversial that the anti-SLAPP statute applies.⁴

B. The Court of Appeal Correctly Held that the CDA Bars the First Three Causes of Action

Petitioners have not and cannot show that this Court’s review of the Court of Appeal’s application of CDA immunity to the first three causes of action is necessary to secure uniformity of decision or settle an important question of law. As with the application of the anti-SLAPP statute, Petitioners did not seek rehearing on any alleged error by the Court of Appeal, and they present no authority supporting their assertion that the law was incorrectly applied to their claims. Further, Petitioners’ argument that

⁴ Petitioners’ claim that Facebook’s use of the anti-SLAPP statute chills citizens’ ability to petition for a redress of their grievances, especially because they will be on the hook for attorney fees, is a red herring. (Pet. at 3-4, 9.) Not only do Petitioners’ raise this argument for the first time in this Petition, but they misconstrue the purpose of the anti-SLAPP statute, which is to “alleviate SLAPP suits by requiring a plaintiff to reimburse a prevailing defendant for expenses incurred in extricating himself or herself from a baseless lawsuit.” (*Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 448 [citing *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 362].) Thus, the Court of Appeal’s order directing the superior court to award Facebook its attorney fees was in line with well-established law, and does not chill reasonable claims. And to the extent awarding fees chills meritless lawsuits, the anti-SLAPP statute is accomplishing its purpose.

CDA immunity was created only for “defamation-based liability” is demonstrably false.

The Court of Appeal, in affirming the superior court’s decision, correctly held that Petitioners’ first three causes of action against Facebook were barred by the CDA because, at bottom, each claim sought to treat Facebook as the “publisher or speaker” of third-party content critical of Knight and his businesses. The Court specifically rejected Petitioners’ argument that these three claims were premised on Facebook’s own promises and representations to Knight, rather than third-party speech. (*Facebook, supra*, 14 Cal.App.5th at p. 207.) In doing so, the Court of Appeal held, in accordance with established law, that “‘what matters is not the name of the cause of action’; instead, ‘what matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.’” (*Ibid.* [quoting *Barnes, supra*, 570 F.3d at 1101–02].)

Indeed, both federal and California state courts are in agreement on this principle. (See, e.g., *ibid.* [“numerous courts have held the CDA bars claims based on a failure to remove content posted by others”]; *Hupp, supra*, 221 Cal.App.4th at p. 405 [CDA barred breach of contract claim arising from newspaper’s failure to remove comments on website]; *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 573 [CDA barred tort claims seeking to hold MySpace liable for “failing to exercise a publisher’s traditional editorial functions, namely deciding whether to publish certain

material or not”]; *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 835 [CDA barred negligence claim based on eBay’s failure to remove or alter allegedly fraudulent product descriptions]; *Caraccioli v. Facebook, Inc.* (N.D. Cal. 2016) 167 F.Supp.3d 1056, 1064-65 [dismissing plaintiff’s claims for breach of contract and negligence for Facebook’s decision not to remove content, as liability based on that sort of vicarious responsibility is what section 230 of the CDA seeks to avoid]; *Klayman v. Zuckerberg* (D.C. Cir. 2014) 753 F.3d 1354, 1359 [CDA barred negligence claim based on insufficiently prompt removal of Facebook pages]; *Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.* (N.D. Cal. 2015) 144 F.Supp.3d 1088, 1094-95, *affd.*, ___ Fed.App’x ___, 2017 WL 4118358 (9th Cir. Sept. 13, 2017) [CDA barred claim alleging that Facebook violated title II of the Civil Rights Act of 1964 by blocking access to plaintiff’s Facebook page in India because it sought “to hold Defendant liable for Defendant’s decision ‘whether to publish’ third-party content”].)

Petitioners have not pointed to any authority supporting its theory limiting the CDA to “defamation-based liability” or calling into doubt the CDA’s focus on “whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” (*Barnes, supra*, 570 F.3d at pp. 1101–1102.) Indeed, this Court has acknowledged that CDA immunity is not limited to defamation claims. (See *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 54 [noting that “section 230(c)... was aimed at protecting against liability for claims such as

negligence”].) Once again, Petitioners are simply attempting to get a third bite at the apple by claiming, without any basis, that the CDA applies only to causes of action for defamation and that their claims are premised on Facebook’s conduct with respect to Petitioners, rather than its conduct with respect to third party speech on its platform. (Pet. at 4, 14.)

Because Petitioners identify no conflict among the Courts of Appeal nor any important and unsettled question of law, their petition for review should be denied. Petitioners desire to quibble with the application of the law to the facts is improper. They did not petition the Court of Appeal for rehearing, and they therefore may not now argue that the Court of Appeal erred by applying well-established law to Petitioners’ formulation of the facts of this case. (Cal. Rules of Court, rule 8.500(c)(2).)

C. The Court of Appeal Properly Dismissed Petitioners’ Right of Publicity and Derivative UCL Claims on the Grounds that Knight Failed to Demonstrate Any “Use” of his Name or Likeness *By Facebook*

Petitioners have not demonstrated the need for this Court’s review of the Court of Appeal’s ruling that Knight failed to allege a “use,” let alone a “commercial use,” of his name and likeness *by Facebook*. Again, Petitioners do not cite any authority or even argue that there is an unsettled, important question of law regarding the Court of Appeal’s application of the statutory and common law right of publicity claims to the facts at issue in this case.

Nor can they. It is well-settled that both statutory and common law right of publicity claims require a “use” of the plaintiff’s identity by the defendant, which Knight has not and cannot show here. (See, e.g., *Montana v. San Jose Mercury News, Inc.* (1995) 34 Cal.App.4th 790, 793 [requiring “the defendant’s use of the plaintiff’s identity”] [emphasis added] [quoting *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 417]; *Perfect 10, Inc. v. Google, Inc.* (C.D. Cal. July 30, 2010) No. CV 04-9484 AHM SHX, 2010 WL 9479060, p. *13, *affd.* (9th Cir. 2011) 653 F.3d 976) [“P10 has not shown that Google is, in fact, inappropriately *using* the models’ likenesses. Because both the statutory and common law versions of a right of publicity claim require that the defendant actually use the plaintiff’s likeness, P10 has not established that it is likely to prevail on its right of publicity claim.”] [citing *Fleet v. CBS, Inc.* (1996) 50 Cal.App.4th 1911, 1918].) Indeed, Petitioners’ Complaint alleges that third parties, *not Facebook*, created the content and made the statements about which Knight complains. These allegations alone are fatal to his right of publicity claims against Facebook.

Further, it is a matter of well-settled law that a plaintiff must demonstrate not only a “use” by the defendant, but a “commercial use” to state a claim under the right of publicity statute. Accordingly, the Court of Appeal held, in line with both state and federal law, that “the statute requires some ‘use’ by the advertiser aimed at obtaining a commercial advantage for the advertiser.” (*Facebook, supra*, 14 Cal.App.5th at pp. 210-

11 [citing *Eastwood, supra*, 149 Cal.App.3d at p.420].) Thus, the Court of Appeal reached the uncontroversial conclusion that Knight failed to demonstrate “commercial use” by Facebook because he “ha[d] not even alleged—let alone shown—that any advertiser used his name or likeness,” and thus could not “establish that anyone, let alone Facebook, obtained an advantage through use of his identity.” (*Id.* at p. 211.) The Court of Appeal continued that “[a]t most, Knight has shown that Facebook allowed unrelated third-party advertisements to run adjacent to pages containing users’ comments about Knight and his business practices. This is insufficient.” (*Id.* at pp. 210-13 [citing *Newcombe v. Adolf Coors Co.* (9th Cir. 1998) 157 F.3d 686; *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664].)

Knight ignores his inability to demonstrate “use” or “commercial use” by Facebook, and merely hypothesizes that because the pages and comments critical of him appeared on Facebook, a “use” by Facebook must have occurred and that this “use” must have been “knowing.” (See Pet. at 16.) He similarly suggests that “clarification on the meaning of use ‘in any manner ... for the purposes of advertising’ would be helpful. (See Pet. at 17).

Not only are these issues alleged errors that should have been raised in a motion for reconsideration but were not, Knight’s entire discussion of whether a use was “knowing” or occurred “in any manner” are red herrings. In addition, they are based on speculation about instances in which

“knowing use” *could occur*⁵ in online advertising or what “in any manner” may mean (see Pet. at 16), but such speculation does not provide a basis for review by this Court, because this issue was never presented to the Court of Appeal. (*Peevy, supra*, 17 Cal.4th at p. 1205 [“Further, it is our policy not to review issues that are dependent upon development of a factual record when those issues have not been timely raised in the Court of Appeal or not reached in that court, when the latter omission was not brought to the attention of the Court of Appeal by petition for rehearing.”] [citing Cal. Rules of Court, rule 8.500(c)].) Indeed, the record in the superior court is devoid of any evidence to explain Knight’s suppositions as to how Facebook advertising operates.

Moreover, regardless of the advertising technology involved, “a plaintiff must show that *the defendant* appropriated the plaintiff’s name or likeness for commercial purposes, and there must be a direct connection between the defendant’s use of the likeness and that commercial purpose.” (*Perfect 10, supra*, 2010 WL 9479060 at p. *13 [rejecting theory in the context of online advertising that Google was “materially contributing” to violation of publicity rights by providing advertising alongside use of models’ likeness].) And no such evidence exists here.

⁵ The Petition speculates, without support, that “[k]nowing use’ could occur when a person of the organization... directly views the content that has been posted” or “when an algorithm or internal technological program detects the specific content or image that has been posted on the site and aligns related advertising accordingly.” (Pet. at 16.)

In sum, Knight has identified no basis to review the Court of Appeals sound analysis of his right of publicity claims.

D. Review of Issues Not Presented in the Court of Appeal is Neither Proper Nor Warranted

Finally, Petitioners' argument that review of each of the six causes of action is warranted in light of the "modern context of interactive computer services and internet advertising" fares no better. (Pet. at 18-20.) As with the other issues contained in the Petition, Petitioners did not ask the Court of Appeal to correct any error or identify any issue that Court of Appeal failed to address. Petitioner's characterization of the "modern context of interactive computer services and internet advertising" is unsupported by any analysis and is nothing more than wishful thinking. Neither interactive computer services nor internet advertising are new. Interactive computer services have been around for decades, as evidenced by Congress's use of that term when passing the CDA in 1996. (See 47 U.S.C. §230). Further, Petitioners' perceived issues relating to "modern internet advertising" are unsupported in the record and untethered to the allegations in their Complaint.

Moreover, the crux of Knight's right of publicity claims has nothing to do with the issue of online advertising technology. Rather, it seeks to create liability based solely on the presence of unrelated ads appearing adjacent to user generated content that use Knight's name or likeness in a manner he does not like. The Court of Appeal faithfully applied well-

established principles of law and devoted more than six pages of its opinion to explain that Knight had failed to demonstrate any cognizable use of his name or likeness by Facebook, let alone any commercial use for purposes of advertising by anyone. (*Facebook, supra*, 14 Cal.App.5th at 206-13.)

CONCLUSION

The Petition for Review should be denied.

DATED: October 10, 2017

Respectfully submitted,

PERKINS COIE LLP

By: /s/ Eric D. Miller

Eric D. Miller, Bar No. 218416

EMiller@perkinscoie.com

*Attorneys for Respondent
Facebook, Inc.*

WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204(c), counsel of record hereby certifies that the foregoing Response to Petition for Review consists of 7,445 words, including footnotes, as counted by the Microsoft Word program used to prepare this Response.

DATED: October 10, 2017

Respectfully submitted,

PERKINS COIE LLP

By: /s/ Eric C. Miller

Eric D. Miller

*Attorneys for Respondent
Facebook, Inc.*

PROOF OF SERVICE

Jason Cross, et al. vs. Facebook, Inc.

California Supreme Court Case No. S244412, S244433

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the City of Palo Alto, County of Santa Clara, State of California. My business address is 3150 Porter Drive, Palo Alto, California 94304.

On October 10, 2017, I served copies of the following document(s) described as:

FACEBOOK, INC.'S ANSWER TO PETITION FOR REVIEW

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

☒ **BY TRUEFILING:** On this day, I caused to have served the foregoing document(s) as required on the parties and/or counsel of record designated for electronic service in this matter on the TrueFiling website.

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Perkins Coie LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 10, 2017, at Palo Alto, California.



Ruth St. Amant

SERVICE LIST

Jason Cross, et al. vs. Facebook, Inc.

California Supreme Court Case No. S244412, S244433

Mark Punzalan
Heidi Kim
PUNZALAN LAW, PC
600 Allerton Street, Suite 200
Redwood City, CA 94063

Via TrueFiling

Honorable Donald J. Ayoob
San Mateo Superior Court
400 Counter Center
Redwood City, CA 94063

Via U.S. Mail

Todd G. Cole
COLE LAW GROUP, PC
750 Old Hickory Boulevard
Building Two, Suite 202
Brentwood, TN 37027

Via TrueFiling

California Court of Appeal
First Appellate District, Division 2
350 McAllister Street
San Francisco, CA 94102

Via TrueFiling